LUCY HYEXIKOK

IBLA 75-542 Decided December 23, 1975

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting Alaska Native allotment application AA-7412.

Affirmed.

1. Alaska: Native Allotments

   Where a Native allotment applicant has had an adequate opportunity to submit credible evidence of substantially continuous use and occupancy of the land at least potentially exclusive of others, but has failed to make such a showing, the application is properly rejected.

2. Alaska: Native Allotments

   Over 20 years of nonuse of land by an applicant for a Native allotment negates any assertion of substantially continuous use and occupancy and militates against a finding of substantial actual possession potentially exclusive of others, as required by law and regulation. The period of nonuse vitiates any effective qualifying use and occupancy which may have preceded the long period of lack of use.

APPEARANCES: Henry W. Cavallera, Esq., and Federick Torrisi, Esq., of Alaska Legal Services Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Lucy Hyexikok has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated April 18, 1975, which rejected her application for Native allotment filed pursuant to the

Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), and the pertinent regulations, 43 CFR Subpart 2561. The application was rejected because the BLM field examination indicated no evidence of the applicant's use and occupancy of the site. The State Office therefore held that the applicant had not occupied the land as contemplated by the Native Allotment Act.

Appellant filed her application (March 27, 1972) for lands located within protracted section 8, T. 15 S., R. 65 W., Seward Meridian. She alleged seasonal use and occupancy for fishing, clam picking and herring egg picking from May 1958 to the date of application. She claimed improvements of a campsite and a fishrack valued at $175.

The BLM conducted a field examination on August 17, 1973. The BLM field examiner was accompanied by the Togiak Village President who was familiar with the area. They could not find the claimed improvements or any evidence of recent use or occupancy of the site. The examiner concluded that the applicant had not met the requirements of the law.

On May 31, 1974, the BLM notified appellant of the findings of the field examiner. She was first allowed 30 days for submission of additional information to support her claim. That period was extended an additional 60 days and she was also sent a copy of the field examiner's report and suggested guidelines for statements of witnesses.

Appellant responded submitting her own statement and statements from her sister and her husband that she had been using the land since 1943 for hunting, trapping and berrypicking. However, these statements 1/ indicated she had not used the land since 1954. The Bureau's decision followed rejecting appellant's application.

[1] A Native allotment applicant is required by the Act to make satisfactory proof of "substantially continuous use and occupancy of the land for a period of five years." Such term is defined by regulation, 43 CFR 2561.0-5(a), as:

> The term "substantially continuous use and occupancy" contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

1/ The husband's statement is somewhat ambiguous on this point.

The burden to present clear and credible evidence to establish compliance with the law and the regulations is on the applicant. Gregory Anelon, Sr., 21 IBLA 230 (1975). Appellant has been offered more than adequate opportunity to make such a showing and has failed to meet this burden. From our review of the record the preponderance of credible evidence indicates that the land applied for has not been used or occupied as contemplated by the law and the regulations.

[2] Moreover, appellant has admitted that she has not used or occupied the land for over 20 years. We have recently pointed out that a long period of nonuse negates any assertion of substantially continuous use and occupancy and militates against a finding of substantial actual possession potentially exclusive of others, and not intermittent, as required by law and regulation. The nonuse vitiates the effectiveness of any use and occupancy which may have preceded such a long period of lack of use. William Carlo, 21 IBLA 181 (1975). Accordingly, we find the State Office decision is proper in this case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Martin Ritvo
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Edward W. Stuebing
Administrative Judge